

11 JU 62

22
The Right Honourable Gilbert
Laurie, and others, } Appellants.

23

John Cleland, and Walter Ferguson, Respondents.

The Appellants C A S E.

To be heard at the Bar of the House of Lords on
Monday the 28th Day of March 1774.

J. T. URBOW.
J. A. MONTGOMERY.

Robert Waddell, *Esquire, Conjunct Principal Clerk of the Bills, in the Court of Session,* - - - - - } Appellant.

Charles Inglis, *Deputy Clerk of the Bills, in the Court of Session,* - - - - - Respondent.

Appellant's C A S E.

THE Office of Principal Clerk to the Bills in the Court of Session in *Scotland* is a Place of very high Trust and Importance, and at the same Time attended with great Risque to the Person who holds it, in respect of the Responsibility he thereby incurs.

One of the most important Branches of the Duty of this Office is the Trust of revising and comparing the Grounds of all Diligences, that can affect either the Estate or Personal Liberty of the Subject; for though the Warrants of such Diligences are, and must be, always signed by the Lord Ordinary on the Bills, yet the Trust of revising and comparing the Grounds upon which the Warrant proceeds is committed to the Clerk of the Bills, and the Lord Ordinary grants his Deliverance on the Faith of the Clerk's Subscription, which is always previously wrote on the Bill.

The Risque of the Clerks in this Office is also very great and extensive: When a Bill of Suspension is presented to the Lord Ordinary on the Bills for stopping the Execution of any Diligence, the Person at whose Instance the Bill is presented must find Caution for Payment of the full Debt, Interest, Penalty, and Expences: In the Event, that the same is found due.—In like Manner, where any Debtor applies to the Lord Ordinary, on the Bills, to be relieved from the Consequences of Arrestment, he must find Caution to the full Amount of the Debt arrested by that Diligence: The Charge of receiving Caution, in all these different Cases, is entrusted to the Clerk of the Bills, who, if he accepts of an insufficient Cautioner, is declared to be liable for the Debt to the Party. The Extent of this Responsibility and Risque is to a very large Sum. The Bonds of Cautionary, in Suspensions, amount, at an Average, to about 12,000 *l.* Sterling *per Annum*; and when to these are added the Bonds of Cautionary for loosing Arrestments and Law Burrows, with the Sums of Money actually consigned at the Office, the whole Amount may be calculated at least to double that Sum.

The Office of Principal Clerk of the Bills was originally in the Nomination of the Lord Register for *Scotland*: By his Commission from the Crown, the Lord Register was specially authorized to appoint that Officer for Life; but no Obligation was imposed upon him in that respect. It was optional to him to grant the Commission of Clerk of the Bills either to subsist during the Life of the Grantee, or so long only as the Lord Register himself should hold his Office: Accordingly it appears that these Commissions were granted sometimes in the one Form, sometimes in the other.

In the Year 1730, the Crown resumed to itself the Nomination to this Office.

Before the Year 1684, the Office of Clerk to the Bills was held by One Person, who performed the whole Duty of that Office by himself and Servants under him; but in that Year Sir *George Mackenzie*, then Lord Register, took upon him to constitute and appoint Two Clerks of the Bills, to be conjunct in the said Office: And by Commission, of 9th *February*, 1684, nominated and appointed Mr. *David Graeme*, during all the Days of his natural Life-time, Conjunct Clerk of the Bills, with Power to him to officiate and exerce said Office “by himself and his Servants to be appointed by him, for whom he should be answerable.”

This new Modification of the Office of Clerk to the Bills was approved of by Letter, of 4th *February*, 1685, from King *Charles II.*, to the Court of Session, signifying the Reasons which induced his Majesty to approve of that Measure; *videlicet*, “That the Office of Clerk to the Bills, which is at the Gift and Disposal of Our Clerk Register, being of very great Importance to the Lieges, doth require a great deal of Care, Dispatch, and Attendance, and nevertheless has been hitherto exercised only by One Person, as Depute to Our Clerk Register, though it had been much more fit, upon several good Considerations, that Two Persons had been employed conjunctly in said Office, as the Custom is in the other Clerkships of the Session; and now understanding that, in Consideration thereof, Our Right Trusty and Well-beloved Counsellor, Sir *George Mackenzie* of *Tarbat*, Our present Clerk Register, has lately granted a Commission to Mr. *David Grahame*, Tutor of *Gorthie*, to be conjunct in the said Office of Clerkship of the Bills with Mr. *John Wedderburn* of *Blackness*, We have thought fit to let you know, that We do not only look upon the same as good Office done by the said Sir *George Mackenzie*, but also do hereby ratify and approve the Commission granted by him to the said Mr. *David*, and the Exercise of the said Office by the Two Persons afore-said, willing and requiring the same to be exercised in that Method in all Time coming: So, recommending it to you to receive the said Mr. *David Grahame* as conjunct in said Office, and Benefit thereof, during his Life.”

From thenceforward down to this Day, as well before as since the Resumption by the Crown of the Nomination and Appointment of the Clerk to the Bills, that Office has been held by Two Principal Clerks, each having a separate independent Commission; and, upon the Death or Resignation of any of these Principal Clerks, a new Commission was granted to his Successor in Office.

When there was but One Principal Clerk to the Bills, the whole Duty of that Office was performed by him, assisted by his Servants, and others acting under him. From the above mentioned Period, when Two Principal Clerks to the Bills were judged to be necessary, in respect of the great Care, Dispatch, and Attendance, which the regular Discharge of that Office did require, One or other of these Principal Clerks did attend, as in Duty they were bound, and officiated in Person by Monthly Rotation; and continued so to do, as far down, at least, as the Year 1711.

Of this there is clear Evidence, from the Bills, between the Years 1685 and 1711, lying in the Signet Office, most of which are signed by one or other of the Principal Clerks for the Time being.

This is moreover certified by *Robert Kinnell*, late Keeper of the Signet Record, who, by Certificate of *June* 16th, 1766, attests, That he had looked through the Bills then lying in the Signet Office, which had past the Bill Chamber for the Months of *June* and *July*, 1687, and that all of these are signed by one or other of the then Principal Clerks of the Bills: That he had also inspected these for the Months of *October* and *November*, 1692, and observed them likewise all to be signed by one or other of the Principal Clerks: That the Cautioners in Suspensions, during the above mentioned Periods, were in like Manner received by them: That the Bills in the Month of *December*, 1695, were in like Manner all signed by one or other of the Principal Clerks, some only excepted: That the Cautioners in Suspensions, for that Month, were likewise received by one or other of the Principal Clerks: That the Bills for the Month of *February*, 1705, were signed promiscuously by one or other of the said Principal Clerks, or by *James Nicolson* their Deputy; and that most of the Bills for the Month of *November*, 1710, were signed by *William Kelfo*, then One of the Principal Clerks, and the Cautioners in Suspensions received by him.

Agreeably to this, *Spottiswood*, in his Form of Process, published in 1711, where he gives an Account of the present State of the College of Justice, under the Section of *the Clerks of the Bills* (p. 68 and 69), gives this Account of that Office: “That there are Two Principal Clerks of the Bills appointed by Commission from the Lord Clerk Register; and under these there are Three Depute Clerks, nominated by the Principals: The Principal Clerks are in Use to attend Monthly in their Turns; and their Duty is to present these Bills to the Lord Ordinary on the Bills. And except the Bills for Letters of Suspension and Advocation, all other Bills are past in Course, and are signed by the Ordinary and Principal Clerk.”

From this Deduction of the Nature, Origin, and Progress of this Office of Clerk to the Bills, it is evident that in the more early as well as in the later Periods, as well since there were Two Conjunct Clerks as when but One, they attended in Person, and discharged the Duty of their Office, with the Assistance of their Deputies and Servants; and that it was but occasionally, and in Absence of the Principal Clerks, that these Deputies and Servants officiated, in Matters of any Consequence.

After this Period, indeed, it appears that the Clerks to the Bills, being for the most Part Gentlemen of independent Fortunes, and unwilling to undergo the Labour and Trouble of attending and officiating in Person, devolved the Whole of the Business upon their Deputies and

and Servants; whereby, in Progress of Time, these Servants or inferior Officers have come to consider this as a Matter of Right, and as an Injury to them if the Principal Clerks interfere in the Business of this Office.

The Course of Succession in this Office, since the Appointment of Two Conjoint Clerks, has been as follows:

- 6th Nov. 1702. Upon the Resignation of Mr. *John Wedderburn*, his Son Sir *Alexander* obtained a Commission to be Conjoint Clerk to the Bills.
 24th Jan. 1710. Upon the Resignation of Sir *Alexander*, Mr. *William Kelfo* of *Dankeith* obtained a like Commission.
 8th May, 1711. Upon the Resignation of Mr. *William Kelfo*, Sir *Philip Anstruther* of *Anstrutherfield* obtained a like Commission.
 22d Nov. 1721. Upon the Resignation of Sir *Philip Anstruther* of *Anstrutherfield*, his Nephew Sir *Philip Anstruther* of *Balcaskie* obtained a like Commission.
 21st May, 1762. Upon the Resignation of Sir *Philip Anstruther* of *Balcaskie*, his Son Sir *Robert*, one of the present Conjoint Clerks, received the like Commission.

The Succession to Mr. *David Graham*, the other Conjoint Clerk, is as follows:

- 13th Dec. 1694. Upon the Resignation of Mr. *Graham*, Sir *Alexander Anstruther* of *Newark* obtained a Commission as One of the Conjoint Clerks to the Bills.
 In 1730. Upon the Resignation of Sir *Philip Anstruther* of *Newark*, his Son Mr. *David Anstruther* obtained a like Commission.
 Feb. 1753. Upon the Resignation of Mr. *David Anstruther*, Mr. *James Burns* obtained a like Commission.

Lastly, Upon the 21st of May, 1762, Mr. (now Sir) *Robert Anstruther* and the Appellant Mr. *Robert Waddel* were appointed Conjoint Principal Clerks to the Bills, the former upon the Resignation of his Father Sir *Philip*, the latter upon the Resignation of Mr. *Burns*.

The Commission to the Appellant, after mentioning the Occasion of the Vacancy, proceeds in these Words: "Constituimus & ordinamus dictum Robertum Waddel durantibus omnibus suæ vitæ diebus Clericum conjunctum tabulæ petitionum in dicto officio nostrorum registrarum & rotulorum dando & disponendo dictum conjunctum officium abante per dictum Jacobum Burns ut dictum est gavisum dicto Roberto Waddel cum plena potestate illi idem per semetipsum deputatos suos seu servos per illum nominandos pro quibus respondebitur gerendi & exercendi & omnibus libertatibus privilegiis & immunitatibus proficuis casualitatibus emolumentis commodis & omnibus aliis utilitatibus quæ pertinere seu pertinere potuerunt ad ullum priorem Clericum dictæ tabulæ petitionum fruendi vel quæ per ullum priorem usum seu consuetudinem ad idem pertinere & spectare dignoscebantur & quorum ullus prior Clericus tabulæ petitionum ullo tempore præterito in possessione fuit & hoc ulla interpellatione ullius partis earundem non obstante."

It is to be observed, that by the Words of this Commission, the Appellant is specially authorized to exercise the same in all its Branches, either personally or by Deputies and Servants appointed by him, and for whom he is answerable; and to receive all Profits and Emoluments which did or could belong to any former Clerk of the Bills, and that without any Obstruction whatsoever to the same.

When the Appellant received his Commission to be Conjoint Clerk of the Bills, he found that Office occupied either by Sole Deputations, Conjoint Deputations, or Conjoint Deputations with a Right of Survivorship, which had been granted by his Predecessors.

Upon the 23d of July, 1713, Sir *Alexander* and Sir *Philip Anstruthers*, then Conjoint Clerks to the Bills, had concurred in granting a Commission to *Charles Inglis*, Writer in *Edinburgh* (the Father of the Respondent), "nominating and appointing him to be their Depute, for officiating under them and their Successors in Office, during his Life-time, in all Bills of Suspension and Advocation, to be given in at their Office and presented before the Lords of Session, and to receive the Bonds of Cautionry, and uplift the ordinary Dues of the said Bonds of Cautionry, and apply the same to his own Use; and generally to act and do under them the said *Alexander* and Sir *Philip Anstruthers* and their Successors, in the said Office of Clerkship, in all and every Thing as *James Nicolson* or *Henry Oliphant*, former Deputes, were in use to do."

In 1742, Sir *Philip* and Mr. *David Anstruthers*, then Conjoint Clerks to the Bills, granted a new Commission, of the same Tenor with that of 1713, to the said *Charles Inglis* and his Son (the Respondent), and the Survivor of them, to be their Clerk's Depute. This was the first Instance of a Grant of this subordinate Office to Two Persons, with Benefit of Survivorship.

In 1747, after the Death of *Charles* the Father, a new Commission in the same Terms was granted to *Charles* the Son (the Respondent) by the said Sir *Philip* and Mr. *Anstruther* to officiate under them.

Another inferior Branch of this Office had been held under a like Deputation by Mr. *Robert Cramond*, upon whose Death, the said Sir *Philip* and Mr. *David Anstruthers*, in 1742, granted a Commission to the Respondent, "to officiate as their Servant in the Bill Chamber, in Place of *Robert Cramond*, deceased, and that during all the Days of his natural Life, with full Power to him, to uplift all Dues and Perquisites ordinary and extraordinary, giving Copies of Suspensions and Advocations, and other Dues and Emoluments that were in use to be paid to *Robert Cramond*, or others, his Predecessors, and to apply the same to his own Use, &c."

In 1749, the said Sir *Philip* and *David Anstruthers* granted another Joint Commission to the said *Charles Inglis* the Respondent, and his Brother *Laurence*, and to the Survivor of them, as their Servants in the Bill Chamber, in the Place of *Robert Cramond*; so that here again another subordinate Conjoint Commission in that inferior Branch of Duty of Servant in the Bill Chamber was endeavoured to be established.

The Appellant, who had been bred to Business, resolved, upon his Appointment to the Office of Conjoint Principal Clerk to the Bills, to attend and discharge in Person the Duty of that Office, which his Predecessors, during so long a Period, had performed by their Deputies. His Education qualified him to do the Business of the Office, and he esteemed it his Duty not to delegate to another a Trust which he was able himself to perform. With respect to the Public, he knew it to be an Office "of great Importance to the Lieges (as described in the Letter of King *Charles II.*) requiring a great deal of Care, Dispatch, and Attendance." He was aware of the Danger to which he himself must be exposed in the Articles of Consignments and Cautionries, or from any other Breach of Duty in the Deputies or Servants. Upon Principles of Duty and Prudence as well as from Inclination, he resolved therefore not to hold his Office as a Sinecure, but to do the Business of it in Person, with the Concurrence of his Colleague, if he should think proper to attend and officiate, and with the Assistance of such Deputies and Servants as they should jointly or severally appoint.

This his Resolution he communicated to Sir *Robert Anstruther*, the Conjoint Principal Clerk, and, by his Approbation, notified the same to the Respondent, from whom he met with an absolute Refusal, to allow either him or his Colleague to have any Concern in this Office, further than to receive Payment from him the Respondent, of such Dues as he was pleased to acknowledge belonged to them.—The Appellant, unwilling to engage in a Law Suit, went so much further, as even to tender a Submission of all debateable Matters to any Gentleman of Character to be by them mutually named; which being also rejected, he, upon the 6th of March 1764, and by Special Authority from Sir *Robert Anstruther*, made a formal Requisition by Instrument of Protest, in Substance importing, "That in Terms of the Commission from the Crown, he the said *Robert Waddel* was to attend personally from and after the Term of *Whitsunday* then next, and to do the Business of the Bill Chamber, to receive, present, and read to the Lords, all Bills of Suspension, Advocation, and other Papers given in to the Office, and transact and do every Thing relative thereto, further than as therein after-mentioned, which was to be committed to the Care of the said *Charles Inglis*; that he was to remove the Office from the said *Charles Inglis*'s House; that he was to take up from the said *Charles Inglis*, into his own Custody, all the Papers then in Possession of the said *Charles Inglis*, relative to said Office, and what consigned Money should then be in his Hands; and therefore required the said *Charles Inglis* to have full Inventories made up of all the Papers in the Office, and the Register of the Bonds of Cautionry filled up, and these, together with the Bonds themselves, and the Minute Books where the consigned Money is marked and set down, and the consigned Money itself, ready to be delivered up at the said Term; and in general, that he should deliver up all Receipt Books, Minute Books, or other Books, Records, and Papers in his Custody, relative to said Office. That he was also to draw and receive the Fees paid at the Office for the different Branches of Business, specifying at the same Time, the particular Branches of Business in which *Charles Inglis* was to officiate as Assistant to and under the Direction of them the Principal Clerks; but that this was not meant to prejudice the said *Charles Inglis* of any of the Dues to which by his Commission he was justly entitled."

To this Requisition, the Respondent did not deign to make any Answer; and therefore, upon the 26th of May 1764, a Second Instrument of Protest was taken against him, intimating, that as a proper Office was provided for the Custody and Preservation of the aforesaid Records, Books, and other Writings, therefore requiring him to deliver up the whole Premises, in order to be removed to the New Office provided for them, and to permit them, the Principal Clerks, to officiate in the said Office, and not to interfere therein, otherwise than as above-mentioned, except in the Absence of them the Principal Clerks.

To this Requisition, after Two Days Deliberation, the Respondent made the following Answer, in Substance importing, "That as he, the Appellant, had shewn no Mandate or Authority from Sir *Robert Anstruther*, he must take it for granted, that Sir *Robert* did not concur therein; that he never refused to deliver up to the Principal Clerks the consigned Money, upon getting sufficient Security to relieve him at the Hands of the Persons having Right thereto; that he had no Objection to Sir *Robert*, or any Person authorized by him, drawing his Half of the Dues instantly, upon its being paid into the Office, nor to the Appellant's attending to receive his own Dues; but that as to the

"other

" other Articles of the Protest, he, by his Commission, and by the constant and immemorial Usage, is entitled to keep the Office as it now is, to exerce all the other Branches of the Duty, and to enjoy all the Profits or Perquisites thence arising, that either he or his Predecessors have hitherto enjoyed, and therefore does not think himself bound, nor in Safety, to comply with what is otherwise required, unless he shall be appointed so to do by Authority of the Court of Session."

The Objection first above-mentioned of the Appellant's not being authorized by Sir Robert Anstruther, the other Principal Clerk, to use his Name in making the above Requisition, was most groundless and affected, as Sir Robert's Letter, specially authorizing the same, was tendered to the Respondent, but which he refused to inspect: As the Refusal to allow the Principal Clerks to officiate, or to deliver up the Records and other Writings belonging to the Office, was qualified with an Exception of his being appointed so to do by Authority of the Court of Session, Sir Robert and the Appellant being advised that this was the proper Subject of a Summary Application to the Court, they concurred in joint Petition, the Prayer of which was, to find, " That they, the Principal Clerks of the Bills, were entitled to discharge the Duty of the said Office personally; and that the Respondent, as Depute under them, was only entitled to be assisting to and subservient to them in such Branches of the Business of that Office as they should please to commit to him, except in the Case of their Absence; and that, as a Consequence of the Premises, they were intitled to take into their own Custody and Keeping, in the Office prepared for that Purpose, the whole Books, Records, and other Writings, Bonds of Cautionry, consigned Money, and others belonging to the said Office, and to ordain the Respondent to surrender and deliver up these to them, upon Inventory or otherwise, as their Lordships should think proper."

24 July, 1764.

But upon advising this Petition with the Answers thereto made on the Part of the Respondent, the Court was pleased, on the 24th July 1764, to pronounce the following Interlocutor: " Find the Petition not competent, and therefore dismiss the same, reserving to the Petitioners to insist against the Respondent in a Declarator or Reduction, and reserving to the Respondent his Defences against the same as accords."

As, by this Reservation, the Court had pointed out the proper Method by which the Merits of this Question should be brought to a fair Trial; *videlicet*, by Process of Reduction and Declarator, a Summons to the above Effect was accordingly raised and executed. This Suit of Reduction and Declarator was brought in the Name of the Appellant only, Sir Robert Anstruther declining his Concurrence thereto in respect of the Obligation of absolute Warrantice contained in the Deputation, which his Father Sir Philip Anstruther had granted to the Respondent; that the Deputation granted to him should stand good and be effectual to him during all the Days of his Life, for which he Sir Robert, as representing his said Father, might be liable.

And accordingly the Respondent, apprehensive as it would appear of the Fate of that Question, and of the Subsistence of his Commission after the Death of both the Principal Clerks, the Granters thereof, brought a Counter Process at his Instance against Sir Robert Anstruther, as representing his Father, upon the Warrantice contained in his Deputation, concluding for 2000*l.* Sterling, as the supposed Value of his Commission, in case the same should be superseded; but in which, little Progress has hitherto been made, as it waits the Event of the present Question.

This Summons of Reduction and Declarator came by Course of the Roll before the Lord Auchinleck, Ordinary in the Outer-house, and contained different Conclusions reductive and declaratory.

Under the First of these, the Appellant insisted for Reduction of the Deputation granted to the Respondent by Sir Philip and Mr. David Anstruthers on the following Grounds: " 1. That the same was *ipso jure* null, as flowing from Persons who never had Power to grant such Deputation, in so far as the Commissions in their Favours bore only a Power to them to exerce that Office by themselves or Servants, but no Power of naming Deputes for Life. 2. As the Appellant by his Commission is declared answerable for the Deputes or Servants who officiate in this Office, he falls to have the Nomination of them while answerable, and therefore that no Deputation granted by his Predecessors was valid; it being contrary to all Law and Justice, that the Appellant should be answerable for Persons over whom (if such Deputation was to stand) he had no Power: And lastly, all Deputations being of the Nature of Factories Mandates, and the like do by Law fall upon the Death of the Granters, and the Granters of this pretended Commission being now dead, the same was fallen, and at an End."

28 June, 1766,
First Interlocutor
appealed from.

The Lord Ordinary, before whom this Reduction came, after various Steps of Procedure unnecessary here to be noticed, made *avizandum* to the whole Lords, with the Debate, and ordered the Parties to lodge their Informations thereon; which being accordingly lodged, the Lords of Session of this Date pronounced the following Interlocutor: " On Report of the Lord Auchinleck, and having advised the Information *hinc inde*, and heard what is above represented, the Lords sustain the Defences, and repel the Reasons of Reduction, and remit to the Ordinary to proceed accordingly."

8th Aug. 1766,
Second Interlocutor
appealed from.

Against this Interlocutor, the Appellant reclaimed by Petition; and, upon Answers being made thereto by the Respondent, their Lordships, of this Date, " adhered to their former Interlocutor reclaimed against, and refused the Desire of the Petition." There were only Fourteen Judges present; Six of them were of Opinion for the Appellant, and Seven for the Respondent; and One Judge gave no Vote.

The Appellant thereafter insisted in the Declaratory Conclusions of his Summons, " To have it declared, That, notwithstanding of the foresaid Deputation in Favour of the Respondent, he had full Power, Right, Title, and Liberty, to officiate and exerce in all and every Branch of the Business in the foresaid Office; and, in Conjunction with the other Principal Clerk, to have the Keeping of all the Records, Papers, and other Writings relative thereto; and that the Respondent should only be assistant and subservient to the Appellant, in such Branches of the Business of the Office as the Appellant should commit to him, and intitled to such Fees only as were specially mentioned in the foresaid Deputation."

July, 1768,
Third Interlocutor
appealed from.

After various Steps of Procedure, the Lord Ordinary took this Point to report also to the whole Lords, and ordered the Parties to lodge their Informations thereon; which being accordingly lodged, the Lords of Session, of this Date, pronounced the following Interlocutor: " On Report of the Lord Auchinleck, and having advised the Informations *hinc inde*, the Lords find, 1. That the Pursuer, *in hoc statu*, by himself, and without the Consent of his Colleague Sir Robert Anstruther, is not intitled to remove the Records, Books, Bonds, and other Writs belonging to the Bill Chamber, from the Custody of Charles Inglis; but that the same are to remain as formerly. 2. That as, on the one hand, the Pursuer is intitled to the whole Fees, Perquisites, and Emoluments, which he has been in Possession of, as Con-junct Principal Clerk of the Bills; so, on the other hand, the Defender is intitled to the whole Fees, Perquisites, and Emoluments, which he and his Predecessors in Office, as Depute Clerk of the Bills, have been in Use to receive and enjoy, and that the Pursuer has no Title to intermeddle therewith. But, before Answer how far the Pursuer is intitled to officiate in the Bill Chamber along with Charles Inglis, remit to the Lord Auchinleck to hear Parties further thereon; and appoint the Pursuer to give in to the Ordinary a Condescendence of the Manner of his proposed Attendance, and the Regulations under which the same is to be given, with Power to his Lordship to proceed in the whole Cause, and to do as he shall see just."

Aug. 1768,
Fourth Interlocutor
appealed from.

Against this Interlocutor the Appellant reclaimed by Petition, and prayed their Lordships, " To find, 1. that the Petitioner was intitled to perform the whole Duty of his Office, as Clerk to the Bills, conjunctly with the Respondent. And, 2. that the Appellant, so acting, was intitled to the just and equal Half of the whole Profits and Emoluments that were presently payable at the Office." Upon advising of which Petition, the Lords, of this Date, pronounced the following Interlocutor: " The Lords having advised the above mentioned Petition, they refuse the same so far as it reclaims against their former Interlocutor, and adhere thereto. And further, in respect of what is set forth in said Petition, and above represented, respecting the Pursuer's Attendance at the Bill Chamber, on this express Condition, That he should be intitled to the just and equal Half of the whole Profits and Emoluments presently payable at the Office; they not only recall the former Remit to the Ordinary, but further, they assilzie the Defender from the whole Conclusions of the Pursuer's present Process, and decern and declare accordingly."

From these several Interlocutors the Appellant has brought this Appeal to your Lordships.

The general Substance of the Arguments on both Sides, in the Court below, at the Bar, and in the Printed Papers, was as follows:

It was contended for the Appellant, upon established Principles of Law, That no Person can transfer to another, by Deputation, any greater Right than is by the Tenor of his own Commission conferred upon himself: That the Nature of the Office of Deputy is to act in the Place of his Principal, and, of course, therefore determines with that of the Principal: That, in the Case of an Office of Trust and Responsibility, this Rule must more particularly hold good, as it is absurd to suppose that any Officer should be responsible for others, as Deputies or Servants to him, of whom he has not either the Choice and Nomination, or the Power of Removal.

That these Principles strongly apply to the Case in Question: The Person acting in the Office of Clerk to the Bills, is in a Situation of Trust of great Consequence to the Public, and for the right Execution of which the Principal in that Office is immediately responsible. The Articles of Consignations in the Hands of the Clerk to the Bills, and the Sums in Bonds of Cautionry received by him, amount, upon an

Average,

Average, to many Thousand Pounds *per Annum*. If any Deficiency is found in these Accounts, or any other Breach or Neglect of Duty, the Principal Clerk of the Bills is, by the express Terms of this Commission, immediately responsible to the Person injured thereby: And in like Manner, by the Act of Sederunt, 18th February, 1686, it is declared, "That the Clerk of the Bills shall be liable for the Party's Damage, as well where he refuses a Cautioner who is sufficient, or is holden and repute to be sufficient, as where he receives an insufficient Cautioner." Under these Circumstances, it seems impossible to suppose the Principal not only to be bound to act by Deputy, instead of acting in his own Person, but also to be concluded, as to the Choice of his Deputy, by the Appointment of his Predecessor. This Idea is moreover contradicted, by the Words of the Commission to the Principal Clerk to the Bills, which, at the same Time that it authorizes him to act in his own Person, gives him the Right of nominating the Deputies or Servants whom he shall think fit to employ in his Office.

In Support of the Appellant's Arguments, he referred to various Instances, in which the Deputy Clerks to the Bills, upon the Death of the Principal, obtained from his Successor a Confirmation of their Office, or endeavoured to secure themselves from any Loss, in case of their Removal by the Successor, by Warranty, binding the Grantor and his Representative to indemnify them, in case of such Removal.

Thus Sir William Bruce, the Principal Clerk to the Bills, granted a Deputation in his Office to Harry Oliphant, Writer in Edinburgh, during the Life of the said Oliphant. But, upon Sir William Bruce's Resignation, Oliphant thought proper to purchase a Confirmation of that Appointment from Sir James Anstruther, the succeeding Clerk to the Bills. In like Manner, Mr. James Nicolson having received a Deputation from Sir William Bruce, that Deputation was confirmed to him by the Three following Principal Clerks to the Bills, Sir James Anstruther, Sir Thomas Stewart, and Mr. John Wedderburn.

In 1683, Mr. John Wedderburn being appointed Principal Clerk to the Bills by Sir George Mackenzie, then Lord Register, he granted a Back Bond to the said Sir George, containing the following Clause: "And I bind and oblige myself and my Forefathers not to quarrel the Gift formerly granted to James Nicolson in the said Office; but (*i. e.* without) Prejudice to me, to quarrel all other Servants their Gifts, if any be that officiate in any other inferior Office in the said Bill Chamber under myself, and for whom I am answerable."—In like Manner Charles Inglis, Father to the Respondent, upon his Appointment in 1713 to the Office of Clerk Depute for the Term of his Life, instead of relying upon that Grant as sufficient to secure him in the Enjoyment of the Office during his Life, did stipulate an Indemnification to himself, in the Event of his Removal from the Office, by an explicit Obligation of Sir Alexander and Sir Philip Anstruther, their Heirs and Successors, in absolute Warrantice, that their Commission should be good and effectual to him during his Life; a Precaution most unnecessary, if it had been understood that the Appointment of the Predecessors would be binding on the Successor. With the same Precaution, upon the Appointment of the Respondent to the Office of Clerk Depute by Sir Philip and Mr. David Anstruther, a similar Security of Warrantice was taken; upon which the Action above stated against Sir Robert Anstruther, as Representative of Sir Philip, has been brought, to indemnify the Respondent, in case of his Removal from the Office.

It was further insisted, That, in the Case of Wedderburn and Oliphant, the Point now in Question received the Determination of the Court of Session. That Case was as follows:

Sir William Bruce, Principal Clerk to the Bills, granted a Deputation to Mr. Henry Oliphant, empowering him "to write upon all Acts in Lawborrows, Suspensions of Lawborrows, Loosing of Arrestments, and Allowances of Comprizings and Adjudications, during the said Mr. Henry his Life-time." This Deputation was confirmed by Sir James Anstruther, who, upon Sir William Bruce's Resignation in 1681, was appointed to the Office. But Mr. John Wedderburn, who, in 1684, was appointed Principal Clerk to the Bills, being desirous to remove Mr. Oliphant from his Office of Clerk Depute, which Oliphant refused to quit, brought for that Purpose an Action against the said Oliphant, for the Reduction of the Deputation granted to him, and the Declarator of his own Right to appoint his Deputies and Servants, upon the following Grounds:

1st, That Sir William Bruce's Commission from the Clerk Register gave no Power to appoint Deputies; but only to execute that Office by himself or Servants. 2dly, That, at any Rate, the Deputation granted to Henry Oliphant could subsist no longer than Sir William Bruce's Commission from the Clerk Register; and as Sir William had made an absolute Resignation of his Office, without reserving the Deputation granted to Oliphant, it could be no longer effectual, *quia resolutio jure dantis resolvitur jus accipientis*. 3dly, That such Deputation was without Example, as no former Clerk to the Bills had ever pretended to grant a Deputation to continue during the Deputy's Life; nor was it ever known that such Deputy, after the Death of the Principal Clerk, pretended to act in that Office without the Consent and Ratification of the succeeding Principal Clerk. 4thly, That such Deputations would be attended with the most dangerous Consequences to the Principal Clerks, who would thereby be liable for the Malversations of these inferior Officers, imposed upon them by the Act and Deed of their Predecessors in Office.

On the Part of Oliphant it was insisted, 1st, That he had paid a valuable Consideration for this Office; so that it would be extremely hard if he was now to be deprived thereof.

2dly, That it was for the Interest of the Subject, that the Depute Clerks should be for Life, as the frequent Change of Persons employed in Public Offices would be the Means of introducing into these Offices Persons ignorant and unexperienced.

3dly, That the Rule *Quod delegatus non potest delegare* holds only in materia Jurisdictionis, not in Officiis.

4thly, That Sir William Bruce's Commission, as Principal Clerk, was as amply conceived as those of his Predecessors in Office; and that it had been usual for the Clerk of the Bills to grant such Deputations, to continue during the Life-time of the Deputy.

5thly, That Sir William Bruce's Resignation could not impair Henry Oliphant's prior *Jus quæsitum*.

6thly, That the Inconveniences or Dangers supposed to arise from making the Principals answerable for Servants appointed by their Predecessors in Office was no Novelty, but obtained in every Case where Deputations might be granted.

Upon this Debate, as the only Defence that appeared to be in any Degree relevant, was the alledged Usage and Custom of granting these Deputations to continue in Force during the Life of the Deputies; a Proof, before Answer was allowed, for ascertaining whether it had been usual and customary for the Clerk of the Bills to grant Deputations to the Servants in that Office, to continue in Force during the Deputy's Life.

Lord Fountainhall, in reporting this Case, after observing that Henry Oliphant had failed in proving the alledged Custom, and that the Court had so found, remarks, That the Court fell upon a new Knack to assilzie Harry Oliphant, *videlicet*, "by sustaining the Commission during Sir William Bruce's Life-time, though that was not the Point that had been disputed; the Debate being, not if it should subsist during the Grantor's Life-time, but if during the Receiver's." And accordingly the Judgment of the Court was in these Words: "Found that the said Sir William Bruce, by his Demission of the said Office, could not prejudice Mr. Henry Oliphant; and that the present Clerk of the Bills his Gift proceeding by Progress upon Sir William Bruce his Demission, he could not question the Deputation granted to the said Henry Oliphant during the said Sir William Bruce's Life-time, and therefore assilzied the said Mr. Henry Oliphant from the Summons of Reduction and Declarator."

This Case is a very strong Authority in Favour of the Appellant. If it had been then understood, that the Principal Clerk to the Bills could grant such Deputations for Life, or if it had been proved that such had been the Usage and Practice of the Office, it cannot be doubted that the Court, who were so well disposed to favour the Defendant Oliphant as to fall upon a new Knack to assilzie him, would have so found and declared; the Point being immediately in Question, and fully argued before them. But as the Judgment only found, That the Deputation could not be challenged during the Life of Sir William Bruce the Grantor; this is the clearest Evidence of its being, at that Time, the Opinion of the Court, that such Deputations could be effectual no longer than during the Life of the Grantor.

The same Question was again brought before the Court in 1728, in an Action of Reduction, by the Earl of Marchmont, then Lord Register, against Sir Alexander Anstruther, Conjunct Principal Clerk to the Bills, and Charles Inglis, Robert Cramond, and William Robertson, Deputies under him, for reducing all their Commissions; the principal Ground of Challenge being, That Sir Alexander had granted these Deputations during the Lives of the Grantees, or *quamdiu se bene gesserint*, though he had no such Authority from the Lord Register. In this Case, a Decree in Absence was pronounced: The Defenders were afterwards allowed to be heard, and the Cause taken to Report. But, before any Decision, the Crown resumed the Nomination of the Principal Clerk to the Bills, and no further Proceedings were had in the Action. This Case is material, to shew the Idea then entertained, that the Principal Clerk to the Bills could not appoint any Deputy to continue longer than his own Life.

Upon these general Principles, thus supported by the Instances of Confirmation and Warrantice, and by the Determination in the Case of Oliphant, it was concluded for the Appellant, That the Appointment of the Respondent to the Office of Clerk Depute, by the Appellant's Predecessor, could not possibly be binding on the Appellant; but that the Office of the Respondent was determined.

Under the Declaratory Branch of the Suit it was submitted, that, even supposing the Respondent intitled to hold the Office of Clerk Depute during his Life, it is still impossible that any such Right of Deputation can be sufficient to bar the Appellant from doing the Duty of his own Office, or receiving the Dues incident to that Duty.

The Nature of a Commission of Deputation, is an Authority to act in the Absence of the Principal; but cannot exclude the Principal from discharging in Person the Duty of his Office.

By the Appellant's Commission from the Crown, he is impowered to act either *per semetipsum*, or by Deputies and Servants, and to receive all Profits, &c. which have belonged *ad ullum priorem Clericum dictæ tabulæ petitionum*.—From these Words it is manifest, that it is optional to the Principal Clerk to act in Person or by Deputy, and that he is intitled to claim all the Dues which any former Principal Clerk was ever entitled to receive.

The Letter of Charles the II^d. upon the Appointment of the First Conjunct Principal Clerk, evidently proves, that the Office of Principal Clerk, instead of being regarded as a *Sinecure*, was so much considered a Place of Business, as to require more Care, Dispatch; and Attendance, than One Person was able to discharge. It is evident, that the Principal at that Time did the Duty of his Office in Person, and consequently received all the Dues incident thereto. The Appellant's Commission authorizes him to do the same Duty, and receive the same Dues; which were received by any of his Predecessors at that or any other Period.

It appears, by the Bills in the Signet Office, and by the Certificate of Robert Kinnell, Keeper of the Signet Record, that the Principal Clerk to the Bills did officiate in Person so late as in the Year 1711; and accordingly Spottiswood, in his Account of that Office, published in 1711, says, *That the Principal Clerks were in use to attend Monthly in their Turns*.

The Appellant moreover insisted, That the Interest of the Crown, in the Right of appointing the Principal Clerk of the Bills, would be greatly prejudiced by the Allowance of the Right set up by the Respondent: That, if every Principal was intitled to appoint Deputies for Life, with all the Duty and most of the Emoluments of the Office, to continue even after the Death of the Principal, this would, in Effect, transfer from the Crown to its Officer the Right of appointing his Successor in Office, as it would render the Office itself, during the Life of such Deputy, of a Value greatly short of its natural Right, transferring to the Nominee of the Officer the Duty and principal Emoluments of the Office. This Consideration becomes the more important, as it appears that the Principal Clerks have, on different Occasions, appointed Joint Deputies, with Benefit of Survivorship, and that the Respondent himself holds under Grants of this Kind: According to these Precedents, the Officer of the Crown may not only substitute a new Life, instead of his own, in the beneficial Interest of the Office, but any Number of Lives he thinks fit; so as, in Effect, to bereave the Crown of its Interest in this Office during the Life of the longest Survivor of them.

On the Part of the Respondent, the general Substance of Argument was, That the Practice of granting these Deputations for the Life of the Deputy is immemorial; and that all the Deputations which can be discovered, from the Year 1651 to the present Time, are of that Kind: That although it may be in general true, that Deputations of Office determine with that of the Principal, it is equally certain, that Usage and Expediency may in a particular Office establish the contrary Rule. Thus the Lord Justice Clerk has the Right of appointing for Life the Principal Clerk of the Justiciary Court, whose Title of Office is Depute Clerk under the Lord Justice Clerk; and the Commissary Clerk, even before the Year 1706, when a Special Power for that Purpose was inserted in their Commissions, did appoint their Deputies for Life: That a Commission by the Lord Lyon to be Lyon Clerk for Life, was adjudged to be effectual after the Death of the Grantor; and that the Principal Clerks of the Session, without any Power in their Commissions to appoint Deputies, do constantly grant Commissions to the Under Clerks for Life, which have never been thought liable to challenge.—That, in like Manner, in the Office of Clerk to the Bills, the Usage is to appoint the Deputies for Life.—That this Usage is attended with much Advantage to the Office, which requires not only a Person of Credit and Character, but of Experience in Business to be employed in the Exercise of it, which no one so qualified would undertake, if he was liable to be dismissed from the Office upon the Death of the Principal by whom he was appointed.

That the Case of *Oliphant* cannot be considered as any Authority upon this Point, which the Court seems purposely to have avoided; the Permanency of the Deputation during the Life of the Grantor, being sufficient for the Decision of the Case then before them: That, even considering that Case as a Determination upon that Point, the contrary Usage of Deputations for Life of the Deputy, which has prevailed ever since that Time, is more than sufficient to remove the Weight of that Decision.

That the Instances of Warrandice, and Renewals of Commission only, shew a Superabundance of Caution, but do not prove such Measures to have been necessary to ensure to the Deputy the Enjoyment of the Office for Life.

That the Appellant's Predecessor, Mr. Burns, was as much intitled to challenge the Respondent's Deputation, as the Appellant can be; and actually had in View to bring an Action for that Purpose, but was dissuaded from it by the Advice of the most eminent Council, and accordingly permitted the Respondent to continue unmolested in the Enjoyment of his Office.—That in like Manner the Respondent's Father continued in Office under his Commission of 1713, notwithstanding the Death of Sir Philip Anstruther in 1722, and though his Successor, Sir Philip of *Balkasbie*, was under no Obligation against challenging the Commission, which he did not renew earlier than 1742.

With respect to the Declarator, the Respondent insisted, that if his Office still continued in Force, he must be entitled to the full Exercise and Emoluments thereof, as much under the present as under the preceding Principals.—That the admitted Fact, of the Office having been constantly executed by the Deputy ever since the Year 1711, without any Instance of the Principal pretending to act in Person, is the strongest Authority to prove the Right of the Clerk Depute to execute the Business of the Office, to receive all the Fees and Perquisites usually paid to the Person officiating therein.

That, if these Observations upon the Office of the Clerk Depute are well founded, the Consequence must be, that the Principal is not responsible for any Breach of Duty in a Deputy, who was not appointed by him, and whom it is not in his Power to remove.

With respect to the Perquisites, that even supposing the Principal Clerks to be entitled to act, they cannot entitle themselves to any Part of those Perquisites which the Clerk Depute has hitherto enjoyed. That certain Fees have immemorially been paid to the Principal Clerks, without Distinction whether they acted or not; and other Fees and Perquisites have constantly and immemorially been enjoyed by the Clerk Depute, which must therefore still remain the Right of his Office to claim and receive. That, in the Agreement between the Appellant and his Predecessor Mr. Burns for the Purchase of the Office of Principal Clerk, it must be presumed, that the Price was adjusted according to those Emoluments which the Office had immemorially produced, and which Mr. Burns himself had received from it; and that in Fact, the Sum of 1500*l*. admitted by the Appellant to be the Price which he paid for the Office, is no more than adequate to its ordinary Profits. On the other hand, that the Respondent's Father had paid for the Office in 1713, the Sum of 20,000 Marks, about 1100*l*. Sterling; and the Respondent himself, in 1742, for the Survivancy of it, paid 500*l*. Sterling upon a Valuation of the Office, at the Rate of the ordinary Profits of the Clerk Depute.

It was further observed, that Mr. Burns, in his Purchase of the Office from Mr. Anstruther, who was liable in Warrandice to the Respondent, must be presumed to have been apprised of the Deputation to Mr. Inglis for Life, and to have undertaken not to molest him therein.—That the Appellant, purchasing the Office from Mr. Burns, purchased it under every Incumbrance that bound his Predecessor.

Besides these Answers upon the Merits of the Question, it was objected for the Respondent, that the Appellant and his Colleague being conjunct in the Office of Principal Clerk, this Action cannot proceed at the Instance of the one, without the Concurrence of the other, and should therefore be dismissed upon the Ground of Incompetency.

To these Answers the Appellant in general replied,

That the Practice of granting Deputations for Life, does by no Means prove any Obligation upon the succeeding Principal to allow such Deputations; the contrary of which appears from the various Instances of Renewals of Deputations and of Warrandice, in case of Removal.

That the Instances mentioned by the Respondent do not at all impeach the general Rule, that Deputations of Office must determine with the Office itself. The Right of the Lord Justice Clerk to appoint the Principal Clerk of Justiciary for Life, is not applicable to this Question, as the Clerk of Justiciary is certainly not Deputy to the Office of Lord Justice Clerk, the one being merely the Clerk, the other the President of the Court: In like Manner the Lyon Clerk is not the Deputy of the Lord Lyon, nor capable of discharging any Part of the Lord Lyon's Office. There is an essential Difference between the Case of an Officer for Life appointing to an inferior Office for the Life of the Grantee, and that of a Deputation being granted for the Life of the Deputy. In the former there is nothing inconsistent, and the Instances of such Rights of Appointment are very numerous: But the Nature of Deputation necessarily restrains the Duration of the Office Depute to that of the Principal, for whom and in whose Place he is appointed to act. The Clerk of Justiciary, and Lyon Clerk, have a Province peculiar to themselves, and do no Part of the Duty of the Lord Justice Clerk, or Lord Lyon. On the other hand, the Clerk Depute to the Bills has no Duty whatever, but that which belongs to the Office of the Principal.

The same Distinction applies to the Case of the Under Clerks of Session, whose Office is different from that of the Principal Clerks; the latter discharging the Business of the Inner-house in Presence of the whole Court, the former that of the Outer-house before the Lord Ordinary, which, by the Constitution of the Court, the Principal Clerks are incapable of performing.

The Commissary Clerk has an express Authority from the Crown, in his Commission, to appoint Deputies for Life. And till he got that Power, his Deputies were only named during Pleasure.

The Appellant averred as a general Proposition, that not a single Instance can be adduced out of the Multitude of Offices in Scotland having Power of appointing inferior Officers, in which the Grant of the Office of Deputy continues in Force after the Death of the Principal, unless by virtue of an Act of Parliament giving that Special Authority, or express Power in the Commission to that Effect.

Thus the Lord Register, by a Special Power in his Commission, was enabled to grant Commissions to Principal Clerks of the Bills for all the Days of their Life-time, or otherways, as he shall think expedient. Under this Authority, the Clerk of the Crown in the Court of Session, nominated by the Lord Register, holds his Office for Life; but it never was pretended, that his Deputy could be entitled to remain in Office after his Death. The Principal Clerk to the Bills was, as above-mentioned, formerly in the Nomination of the Lord Register. The Principle *quod delegatus non potest delegare* applied immediately to this Office, when in the Nomination of the Register; and after the Resumption of that Nomination by the Crown, no new Power of Deputation for Life was granted by the Crown to the Principal Clerks of the Bills in their Commissions.

That the Indulgence of Mr. Burns, in permitting the Respondent to continue in the Office, affords no Argument against the Appellant. The Judgment of the Court in *Oliphant's* Case had declared the Deputation to continue good during the Life of the Constituent, for that he could not, by Resignation of his own Office, take away that Right which he had granted to his Deputy. This Case barred any Challenge by Mr. Burns; as Mr. David Anstruther, by whom the Respondent had been appointed to the Office of Clerk Depute, continued in Life during all the Time that Mr. Burns held the Office of Principal Clerk. The near Relation of the preceding Principal Clerks of the Family of Anstruther, easily accounts for their not bringing into Challenge the Deputations granted to the Respondent or his Father, and can afford no Inference contrary to the Right of Challenge.

With respect to the Declaratory Conclusions, it was replied, that as the Appellant's Commission expressly gives him Authority to execute the Office in Person or by Deputy, he cannot be excluded from acting in Person by any Course or Practice of his Predecessors to the contrary. That the Commission declares the Principal to be answerable for the Conduct of the Persons employed in the Office, without any Restriction to those of his own Appointment; and as the Appellant allows that Responsibility cannot be for a Person appointed by another and incapable of Removal, the Consequence must be, that no Person can be entitled to act under the Principal unless by his own Nomination.

That if the Principal is entitled to officiate in Person, he must have a preferable Right to that of any Deputy, to the Custody of the Books and Papers, and the Consigned Money of the Office; as it is absurd to suppose that this Charge should belong to the Deputy who is not responsible, in Preference to the Principal who is responsible for them.

With regard to the Fees and Perquisites of the Office, that no Title can arise to the Clerk Depute from the Practice of the Office, whilst the whole Duty of the Office was performed by the Deputy. These Emoluments, being paid in Consideration of Business done at the Office, were naturally received by the Person officiating there.

With respect to the Transaction between the Appellant and Mr. Burns, about the Purchase of the Commission, it was averred by the Appellant, that no Stipulation was made to allow the Respondent's Deputation, which he always understood to be entirely dependant on the Pleasure of the Principal. That Mr. Burns was under no Restraint in this respect, further than that imposed upon him by the Case of *Oliphant*, during the Life of his Predecessor, by whom the Respondent was appointed; and therefore, supposing the Appellant to have purchased under the same Restraint which bound Mr. Burns, that Restraint necessarily ceased upon the Death of Mr. David Anstruther. With regard to the Price, that, even supposing it to be no more than adequate to the Sinecure Value of the Office, no Inference can thence arise, as the Profits of Attendance in the Office were not to be considered as Objects of Purchase; and it is further to be observed, that at the Time of the Purchase the Annual Profits of this Office did not exceed 120 *l.* burthened with a Duty to His Majesty, of 5 *l.* per Cent. And the Sum of 1500 *l.* was more than adequate to the Sinecure Value of an Office of so small an Income. And if any Argument can be drawn from the Price, it is against the Respondent, as he only paid 500 *l.* for an Office he now values at 2000 *l.*

As to the Title of the Appellant to maintain this Action without the Concurrence of his Colleague; it was submitted, that the Commissions to the Two Principal Clerks are several, and independent of each other, and confer upon each a compleat Right to the whole of the Office, "Cum plena potestate illi idem per semetipsum, deputatos suos seu servos per illum nominandos pro quibus respondebitur, gerendi et exercendi." These Words manifestly import, that each of these Persons is to every Intent and Purpose compleat Clerk to the Bills, and entitled to officiate as such; the necessary Consequence of this Right must be, that if he is obstructed in the Exercise of that Right, he may maintain the proper Action to establish his Title thereon. The Appellant does not challenge the Respondent's Title further than as it affects his own Interest in the Office: In so far as that of his Colleague is concerned, it is immaterial to him whether he acts in his own Right, or permit the Respondent to stand in his Place.

Upon the whole, it was submitted for the Appellant,

1st, That the Deputation granted to the Respondent could not bind the Appellant; but necessarily determined, if not upon the Resignation, at latest upon the Death of his Constituents.

2dly, That, supposing him still entitled to hold the Office of Clerk Depute, his Right to officiate as such could only be in the Absence of the Principal Clerks. That the Principal Clerks, or either of them choosing to officiate, is entitled to have the Custody of the Records and Money consigned in the Office, and to receive all the Fees and Perquisites of the Office, except the ordinary Dues upon Bonds of Cautionry, specially allowed in the Respondent's Deputation.

The Court of Session having, by the several Interlocutors above stated, given Judgment against the Appellant, upon the Reductive and Declaratory Conclusions of his Summons, the Appellant conceives himself to be thereby highly aggrieved; and hopes that the same will be reversed by your Lordships, for the following among other

R E A S O N S :

I. Deputation of Office, being merely an Appointment of one Person to officiate in the Place of another, cannot have any longer Duration than the Office itself. It is an Absurdity in Terms, to suppose that a Person appointed to act in the Place of another can have any Right to continue in Office, after the Death of the Principal in whose Place he was appointed to act.

II. The nature of an Office of Trust and Responsibility necessarily implies a Right in the Officer, to choose the Persons to be employed under him in the Business of his Office. It is impossible, and so admitted by the Respondent, that any Officer can be responsible for Persons acting in his Office, of whom he had not the Nomination, and has not the Power of Removal.

The Clerk to the Bills by the express Terms of his Commission, and by Acts of *Sederunt* of the Court, is responsible for the Deputies and Servants employed in his Office: It follows of necessary Consequence, that every Clerk to the Bills must have the Choice and Nomination of the Persons to be employed under him in these Capacities. The Trusts of his Office are so important, and the Subjects of Responsibility of so much Consequence, that no Person could undertake the Hazard of the Clerk to the Bills, if he was under a Necessity of employing in his Office, Persons appointed by his Predecessor.

III. The Case of *Wedderburn* and *Oliphant*, in 1684, is a direct Authority to prove, that the Deputations of this Office cannot bind after the Death of the Principal by whom they were granted.

IV. The Instances by which the Respondent endeavours to prove an Usage of Office, in Favour of the Right of the Clerk Depute, to hold his Office after Death of the Principal, are totally insufficient for that Purpose. The Instances that occur since the Year 1713, in which succeeding Principals have acquiesced in their Predecessors Appointment of Clerks Depute, are easily accounted for, by the near Connection of the Successors to their Predecessors, and by the Obligations of Warranty, by which some of them were bound. Besides, such Usage was interrupted by the Suit instituted by Lord Marchmont, in 1728.

The Instances which occur of Renewals of Deputation by succeeding Principal Clerks, really prove that the subsequent Continuance of Clerk Depute was not by virtue of the original, but of the renewed Appointment to that Office.

- V. Supposing the Deputy entitled to continue in Office after the Death of his Constituents, he must continue as Deputy only. The Nature of his Office entitles him to act in the Absence of the Principal ; but it is an Absurdity in Terms, that any Deputy can have a Right preferable to the Principal, or be entitled to exclude him from the Exercise of his own Office. The Commission to the Clerk of the Bills, gives him express Authority to officiate in Person, and makes him responsible for the Duty of the Office. The Letter from King *Charles* the Second to the Court of Session, upon the Appointment of a Conjunct Clerk to the Bills, proves the Opinion and Intention of the Crown, that the Clerks to the Bills were to discharge in Person the Business of their Office. The Principal officiating in Person must of course have the Custody of the Office, and of the Money and Papers there consigned ; it is absurd to suppose, that the Irresponsible Deputy can have a preferable Right to this Charge, to that of the Responsible Principal. If the Principal is entitled to officiate, he must also be entitled to the Fees and Perquisites incident to the Business of the Office ; the Right of the Clerk Depute to these Emoluments could only be in Consequence of his doing that Business. The Principal doing the Business himself, it is absurd to suppose the Deputy to be entitled to the Fees and Perquisites, unless so far as they are specially granted to him in his Deputation. The Statutes relative to these Fees, as well as the Nature of the Office, prove them to be the Right of the Clerk of the Bills himself.
- VI. The Claim set up by the Respondent is highly prejudicial to the Right of the Crown, in the Appointment of the Principal Clerk of the Bills. That Officer can have no Right but what is conferred upon him by the Grant of the Crown, which cannot be supposed to intend to confer upon him a Right of substituting other Lives in the beneficial Interest of the Office, whereby the Interest of the Crown in the Appointment of the Successor would, by the Diminution of the Value of the Office, be itself greatly diminished.
- VII. Each of the Principal Clerks having a separate and independent Commission, and being thereby constituted compleat Clerks to the Bills, must be entitled to maintain such Action as is necessary to protect or recover the Rights and Privileges of his Office, and cannot be in that respect liable to the Controul of his Colleague by a Refusal of Concurrence. The Appellant does not challenge the Respondent's Right, further than as it relates to his own Office, and interferes with his Right to do the Duty, and receive the consequential Emoluments thereof.
- VIII. That the Appellant, in the Purchase of the Office, came under no Engagement with the Respondent as to his Continuance in the Office of Clerk Depute ; and even supposing Mr. *Burns*, his Predecessor, to have been under Restraint in that respect, this Restraint could not possibly extend beyond the Life of Mr. *David Anstruther*, from whom Mr. *Burns* purchased the Office ; it therefore cannot operate in Bar of the Appellant's Title as Principal Clerk to the Bills, to challenge that of the Respondent's to the Office and Perquisites claimed by him as Clerk Depute. And besides, the Respondent admits that Mr. *Burns* intended to have challenged the Validity of his Deputation.

AL. WEDDERBURN,
THO. LOCKHART.